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BEFORE THE FEDERAL ELECTION COMMISSION

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IN THE MATTER OF MICHAEL MOORE, LIONS  
GATE ENTERTAINMENT CORP., CABLEVISION  
SYSTEMS CORP., RAINBOW MEDIA HOLDINGS  
LLC, THE INDEPENDENT FILM CHANNEL LLC,  
FELLOWSHIP ADVENTURE GROUP, HARVEY  
WEINSTEIN, BOB WEINSTEIN, SHOWTIME  
NETWORK, INC. AND VIACOM INTERNATIONAL  
INC.,

MUR NO. 546

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OFFICE OF GENERAL  
COUNSEL  
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*Respondents.*

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### RESPONSE TO COMPLAINT

Pursuant to 2 U.S.C. § 437g(a)(1) and 11 C.F.R. § 111.6, the undersigned counsel, on behalf of Respondents Showtime Networks Inc. ("SNI") and Viacom International Inc. ("Viacom International"), respectfully submit that the Federal Election Commission ("Commission") should take no action in response to the above captioned Complaint filed by Claimant, Citizens United, and should, instead, dismiss it.

The Complaint speculates that SNI and Viacom International are "about to" violate the ban on "electioneering communications" contained in the Federal Election Campaign Act ("FECA") by "pay[ing] a fee to broadcast *Fahrenheit 9/11* ads that include visual and/or sound clips of President Bush" and/or other candidates for federal office within 30 days of the Republican National Convention and/or 60 days of the general election on broadcast, cable or satellite television. *See, e.g.,* Complaint at pp. 1-2; ¶¶ 17-18. As we demon-

strate below, there is no factual basis whatsoever for the Complaint's allegations against SNI or Viacom International.

SNI owns and operates the premium subscription television networks *Showtime*, *TMC* and *FLIX*, and SNI is a joint venturer in and manager of the premium subscription television network *Sundance Channel* (collectively, the *Showtime Networks*). The *Showtime Networks* are distributed to cable and satellite television customers who pay a subscription fee to receive them. The *Showtime Networks* do not exhibit advertising for consideration and are not ad-supported services. SNI has a premium television motion picture output agreement with Lions Gate Films Inc. ("Lions Gate"), entered into with Lions Gate's predecessor-in-interest LIVE Film and Mediaworks Inc. in 1997, pursuant to which SNI acquired the right to exhibit on the *Showtime Networks* qualifying motion pictures initially theatrically released by Lions Gate and its predecessors during a multiple-year period commencing on September 1, 1997. Pursuant to that output agreement, SNI has the exclusive right to exhibit *Fahrenheit 9/11* by means of premium television beginning sometime in 2005. SNI has not advertised or disbursed funds to advertise *Fahrenheit 9/11* to date and has no intention of doing so before the November election. In fact, SNI is contractually barred from advertising *Fahrenheit 9/11* to the general public until well after the Republican National Convention and the general election.

Viacom International is SNI's corporate parent. It is not, as the Complaint alleges, a public company. Unlike SNI, Viacom International has no contractual rights to disseminate *Fahrenheit 9/11*, to engage in any marketing of *Fahrenheit 9/11* or to purchase any

advertisements for *Fahrenheit 9/11* now or in the future. In fact, the allegations of the Complaint make clear that the only basis on which Viacom International was named as a respondent is as a result of its corporate relationship with SNI. See Complaint ¶ 6. That is a wholly insufficient basis to proceed as against Viacom International and Viacom International should be dismissed on that ground alone.

### DISCUSSION

The Complaint alleges that the respondents are “about to” disburse funds for broadcast advertisements for *Fahrenheit 9/11* containing images of President Bush or other candidates for federal office in alleged violation of 2 U.S.C. §441(b)(2) and 11 C.F.R. §§ 114.14(a) and (b), which prohibit, *inter alia*, the expenditure of corporate funds for “electioneering communications.” FECA defines an “electioneering communication” as “any broadcast, cable or satellite communication which —

(I) refers to a clearly identified candidate for Federal office;

(II) is made within—

(aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or

(bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and

(III) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.”

See 2 U.S.C. § 434(f)(3)(A)(i).

Even if it could be said that television advertisements for *Fahrenheit 9/11* that identify President Bush or other candidates for federal office are covered by FECA's ban on electioneering communications — and there are strong statutory, regulatory and constitutional arguments to the contrary<sup>1</sup> — the Complaint itself concedes that such advertisements would only be prohibited during the 30 days prior to the Republican National Convention or 60 days prior to the general election. See Complaint at pp. 1-2; ¶¶ 17-18. SNI has not advertised and will not be advertising *Fahrenheit 9/11* on broadcast television or radio, cable television or satellite during these timeframes. Thus, even accepting Claimant's own interpretation of FECA, the Commission should take no action here for the simple reason that, for all its bluster, the Complaint alleges no unlawful activity by SNI.<sup>2</sup>

In fact, pursuant to the output agreement which grants SNI the right to exhibit *Fahrenheit 9/11* on premium television, SNI has been and continues to be explicitly barred

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<sup>1</sup> Respondents believe that advertisements for *Fahrenheit 9/11* on broadcast, cable or satellite are entitled to an exemption from the reach of FECA's ban on "electioneering communications" by the statutory and regulatory "media exceptions." See 2 U.S.C. § 434(f)(3)(B)(i); 11 C.F.R. 100.29(c)(2). Respondents also believe that FECA's application is likely unconstitutional as applied to the speculative factual scenario posited by Claimant. However, such statutory, regulatory and constitutional questions need not be addressed by the Commission at this time because, as noted, SNI has not engaged in any advertising of *Fahrenheit 9/11* to date, nor will it be engaging in any advertising of *Fahrenheit 9/11* prior to the general election.

<sup>2</sup> In early July 2004, a trailer for *Fahrenheit 9/11* which included images of President Bush was shown on *Showtime* as part of a regularly telecast entertainment news segment presented to *Showtime*'s viewers. Even if the segment could be viewed as an advertisement — which it can not — it could not be said to have violated the ban on electioneering communications because, among other reasons, it was disseminated more than 30 days prior to the Republican National Convention and was not "publicly distributed" in that it was not "aired, broadcast, cablecast or otherwise disseminated for a fee." See 11 C.F.R. 100.29 (b)(3)(i). In any event, that segment is no longer being shown on *Showtime* and SNI has no intention of disseminating the trailer for *Fahrenheit 9/11* before the general election.

from advertising or marketing the film to the general public until well into 2005. The agreement specifically provides that SNI may not advertise, promote and publicize the film to the general public prior to 60 days before the date that the film may be shown on the *Showtime Networks*. The contract further provides that the film cannot be exhibited on the *Showtime Networks* until the earlier of June 23, 2005 (*i.e.* 12 months after its United States theatrical release), or six months after it becomes available on home video, pay-per-view, or video-on-demand. Although it is currently not known to SNI precisely when the film will become available on home video, pay-per-view, or video-on-demand, even if it were to become so available today (which it will not), SNI would be contractually prohibited from advertising the film until November 15, 2004, after the date of the general election.

## CONCLUSION

The Commission should take no action against SNI or Viacom International in response to the Complaint because there is no basis whatsoever for doing so. The Complaint should be dismissed.

Date: July 15, 2004

Respectfully submitted,

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